

# Exhibit U



THE CITY OF NEW YORK  
LAW DEPARTMENT

MICHAEL A. CARDODO  
*Corporation Counsel*

100 CHURCH STREET  
NEW YORK, NY 10007

JEFFREY A. DOUGHERTY  
*Special Assistant Corporation Counsel*  
Room 3-126  
Telephone: (212) 788-8342  
Facsimile: (212) 788-9776  
[jdougherty@law.nyc.gov](mailto:jdougherty@law.nyc.gov)

**BY HAND DELIVERY**

September 12, 2006

The Honorable James C. Francis IV  
United States Magistrate Judge  
Daniel Patrick Moynihan U.S. Courthouse  
500 Pearl Street – Room 1960  
New York, New York 10007-1312

Re: Abdell, et al. v. City of New York, et al., 05 CV 8453 (KMK) (JCF)

Dear Judge Francis:

I write in reference to the above referenced action, which is an RNC case consolidated before Your Honor for discovery. In this case, plaintiffs David Barrows, Benjamin Bernard, Colleen Cook, Matthew Dietzen, Calla Evans, Adam Feinstein, Barrett Gross, Kathleen Hernandez, Alexander Holley Drummond, Benjamin Hunt, Jennifer Janney, Michael Joseph, Pepper Judd, Sarah Kanouse, Jay Kantor, Andrew Laken, Tessa LaLonde, Jonothan Logan, Ryan McGee, Barbara Ann Meisinger, Tristan Migliore, Mark Nechay, Daniel O'Reilly-Rowe, Katherine Poe, Shannon Petrello<sup>1</sup>, Steven Scofield, Robert J. Siegel, Sarah Tepsic, Ann Trudell, Christy Ann Turner and Zachary Vreeland (collectively Plaintiffs) allege emotional distress and psychological injuries and seek related damages. (See selections of Plaintiffs' Complaint attached as Ex. A at ¶¶ 36, 38 and 40; see also Plaintiffs' responses to Interrogatory No. 5 attached as Ex. B). In connection with properly defending this action defendants seek discovery of Plaintiffs' psychological history.

In response to defendants' interrogatories and document requests, Plaintiffs objected to providing any information regarding their psychological histories. (See Ex. B, Plaintiffs' responses to Interrogatories No. 7-9). Specifically, Plaintiffs' interrogatory responses indicate

<sup>1</sup> Plaintiff Shannon Petrello has provided a single release for "the Counseling Center-SIUC." However, her discovery responses remain deficient because she has not formally supplemented her responses to interrogatories 7-9 or provided any additional responsive releases.

Hon. James C. Francis IV  
September 12, 2006  
Page 2 of 2

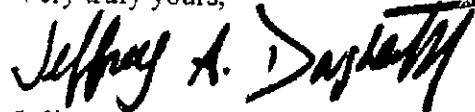
they either refuse to provide proper interrogatory responses and releases or alternatively are waiting until the "conclusion of the litigation on this issue." Accordingly, in the hopes of obtaining conclusive responses in advance of scheduling Plaintiffs' depositions, defendants contacted Plaintiffs and requested that they remedy these discovery deficiencies.

As Your Honor is aware, this Court has repeatedly ruled that defendants are entitled to discovery of a plaintiff's psychological history when a plaintiff alleges psychological harm. See e.g., Judge Karas' August 29, 2005 rulings in Macnamara, et al. v. City of N.Y., et al. 04-CV-9216; Your Honor's February 2, 2006 order in Hershey-Wilson v. City of N.Y., et al. 05-CV-7026, affirmed May 1, 2006; Your Honor's May 16, 2006 memorandum order in Jarick v. City of N.Y., et al. 05-CV-7626; and Your Honor's June 29, 2006 Order in Concepcion v. City of New York, et al. 05-CV-8501.

Despite this Court's clear and consistent rulings on these issues, which defendants have discussed with Plaintiffs, Plaintiffs remain uncooperative and refuse to respond to interrogatories 7-9 to the extent they seek Plaintiffs' mental health treatment information. Specifically, these interrogatories request Plaintiffs to identify providers that rendered them counseling and psychiatric services and/or provided medications and prescription drugs to plaintiff within the past 10 years. Plaintiffs have also refused to provide medical release related to any such providers.

Accordingly, defendants respectfully request that Plaintiffs be compelled to: (1) fully respond to Interrogatories Nos. 7-9 by identifying all providers that have rendered them counseling, therapy, psychological treatment or psychiatric treatment within the past 10 years; (2) provide defendants with properly executed releases for all newly identified providers; and (3) provide defendants with properly executed releases for all pharmacies or providers of prescription drugs that Plaintiffs have used in connection with treating any emotional or psychological issues within the past 10 years.

Very truly yours,

  
Jeffrey A. Dougherty

cc: Michael L. Spiegel, Esq. (by Hand Delivery)

# Exhibit V

Law Office of  
**ALAN LEVINE**

99 Hudson Street, 14th Floor  
New York, New York 10013

Tel: (212) 739-7508  
Fax: (212) 431-4278

October 23, 2006

**BY TELEFAX**

Hon. James C. Francis IV  
United States Magistrate Judge  
United States District Court  
500 Pearl Street, Room 1960  
New York, NY 10007-1312

Re: Abdell, et al. v. City of New York, et al.  
05 Civ. 8453 (KMK)(JCF)

Dear Judge Francis:

I write in response to the September 12, 2006 letter from Assistant Corporation Counsel Jeffrey Dougherty requesting an order compelling certain named plaintiffs to identify all treatment providers for the past ten years in connection with their damage claims for emotional distress. Defendants also seek releases from every named provider.

I advised the court in a letter dated March 27, 2006 that four plaintiffs, Christy Turner, Benjamin Bernard, Michael Joseph, and Robert J. Siegel, would not produce such records, even if the consequence were the dismissal of their claims for emotional distress. None of the four sought treatment in connection with their arrests during the RNC and so any treatment records they might have are wholly unrelated to the events at issue here. Given that (1) these plaintiffs do not intend to offer evidence on this issue through a treating psychotherapist or expert, (2) the emotional distress they experienced could not be characterized as a diagnosable psychological injury or mental condition, and (3) their emotional distress was limited to the time of their arrest and detention and a brief period thereafter, we believe that they should not be compelled to produce these records. We recognize, however, that this Court has ruled in other RNC cases that such records must be produced, even under the circumstances applicable to these four plaintiffs, and that Judge Karas has upheld those rulings. Nevertheless, we ask that the Court consider the issue anew in this case.

In our view, under the reasoning of the Second Circuit in *Kerman v. The City of New York*, 374 F.3d 93 (2d Cir. 2004), a case that we believe has not previously been cited to Your Honor in the RNC cases, a plaintiff need not produce treatment records in the circumstances present here. *Kerman* held that, upon proof of a false imprisonment, a plaintiff was entitled to

general damages for the "time lost by the plaintiff during the period of detention and any mental suffering or humiliation sustained in consequence of the arrest or restraint." *Ibid.* at 130-31, quoting McCormick, *Handbook on the Law of Damages*, § 107 at 375-76. Because they are general damages, those damages need not be pleaded and proved, but rather "may be inferred from the circumstances of the arrest or imprisonment. . . ." *Ibid.* at 125, quoting McCormick, *supra*, § 107 at 376. What that means is that in every false arrest and imprisonment case, plaintiffs have a right to recover damages for ordinary emotional distress, *whether they plead it or not.*

Under the logic of defendants' position, the mere allegation of *any* emotional distress deriving from a plaintiff's false imprisonment – whether or not the distress is the ordinary, time-limited mental suffering that would predictably accompany a period of unlawful confinement, and whether or not the plaintiff intends to rely on her own, or any other, psychotherapist in support of her allegation – waives the patient-psychotherapist privilege. But that result is plainly inconsistent with the holding in *Kerman*. If, under *Kerman*, a plaintiff need not plead the ordinary emotional distress that accompanies a false arrest and imprisonment in order to recover for it, then it surely cannot be that she waives the privilege by choosing to recite in the complaint that she suffered that distress.<sup>1</sup>

Because the four named plaintiffs believe that the decision in *Kerman* requires a holding that their refusal to produce the requested provider names and treatment records does not waive the psychotherapist-patient privilege, we urge that the Court deny defendants' request for their treatment providers' names and their treatment records.

The other plaintiffs listed in Mr. Dougherty's letter have also expressed a reluctance to produce the requested names records.<sup>2</sup> While they have not said what they would do if they were

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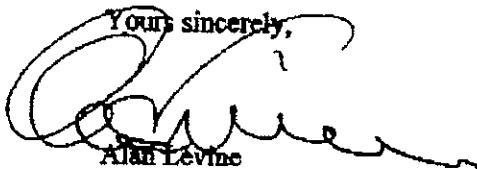
<sup>1</sup>In his recent decision in *Greenberg v. Smolka*, 03 Civ. 8572 (RWS) (MHD) (April 25, 2006), Magistrate Judge Dolinger adopted the logic of *Kerman* – without citing to the opinion itself – in holding that treatment records need not be produced in circumstances such as those present here. In *Greenberg* – a suit arising out of alleged police misconduct – the plaintiff alleged the kind of ordinary, time-limited emotional distress "that any healthy person might feel as a result of" such police behavior. *Ibid.* at 20. As with the plaintiffs here,

she suffered only the sort of distress that could reasonably be attributable to the incident, and she disclaims any more aggravated harm. . . . She . . . indicates that the distress lasted only a matter of weeks and did not lead to the creation or aggravation of any psychological dysfunction or illness. . . . She also commits not to calling her therapist or any other mental health experts as witnesses at trial.

*Ibid.* at 20. Under those circumstances, the plaintiff had not waived the psychotherapist-patient privilege and was not required to produce her treatment records.

<sup>2</sup>Plaintiff Shannon Petrello is the exception; she has provided a release for her mental health records and will provide the requested responses to relevant interrogatories.

faced with the dismissal of their emotional distress claims, we ask that a ruling on the defendants' request concerning the treatment records of these plaintiffs be held in abeyance pending resolution of the issues addressed in this letter. In that regard, defendants raise the need for these records in connection with depositions of the plaintiffs. None of the other 117 plaintiffs have yet been deposed. Those depositions can proceed in the meantime.

Yours sincerely,  
  
Alan Levine

cc: Jeffrey Daugherty, Esq. (By Telefax)

# Exhibit W



MICHAEL A. CARDODO  
*Corporation Counsel*

THE CITY OF NEW YORK  
**LAW DEPARTMENT**  
100 CHURCH STREET  
NEW YORK, NY 10007

JEFFREY A. DOUGHERTY  
*Special Assistant Corporation Counsel*  
Room 3-126  
Telephone: (212) 788-8342  
Facsimile: (212) 788-9776  
[jdoucher@law.nyc.ny.gov](mailto:jdoucher@law.nyc.ny.gov)

**BY FACSIMILE**

November 13, 2006

The Honorable James C. Francis IV  
United States Magistrate Judge  
Daniel Patrick Moynihan U.S. Courthouse  
500 Pearl Street – Room 1960  
New York, New York 10007-1312

Re: Abdell v. City of New York, et al, 05 CV 8453 (KMK) (JCF)

Dear Judge Francis:

I write in reply to plaintiffs David Barrows, Benjamin Bernard, Colleen Cook, Matthew Dietzen, Calla Evans, Adam Feinstein, Barrett Gross, Kathleen Hernandez, Alexander Holley Drummond, Benjamin Hunt, Jennifer Janney, Michael Joseph, Pepper Judd, Sarah Kanouse, Jay Kantor, Andrew Laken, Tessa LaLonde, Jonothan Logan, Ryan McGee, Barbara Ann Meisinger, Tristan Migliore, Mark Nechay, Daniel O'Reilly-Rowe, Katherine Poe, Shannon Petrello<sup>1</sup>, Steven Scofield, Robert J. Siegel, Sarah Tepsic, Ann Trudell, Christy Ann Turner and Zachary Vreeland (collectively "Plaintiffs") October 23, 2006 letter opposing defendants' September 12, 2006 application to compel discovery of their psychological history. Defendants respectfully request that the Court grant their application.

**Plaintiffs Must Provide Releases for Their Psychiatric Providers**

Compelling Plaintiffs to execute releases is the only way defendants can obtain a complete and uncompromised picture of Plaintiffs' psychological histories, which is necessary so that Plaintiffs can be deposed concerning the emotional impact of sources of distress other than their arrests. This information, which goes directly to the legal issues of causation and damages,

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<sup>1</sup> As of the date of this reply, Plaintiff Shannon Petrello's discovery responses remain deficient because she has not formally supplemented her responses to interrogatories 7-9 or provided any additional responsive releases.

Hon. James C. Francis IV  
 November 13, 2006  
 Page 2 of 3

is central to this case and all of the RNC cases. This Court has repeatedly ruled that defendants are entitled to full disclosure of a plaintiff's psychological history when she alleges emotional injuries because she has waived the psychotherapist patient privilege. See e.g., Judge Karas' August 29, 2005 rulings in Macnamara, et al. v. City of N.Y., et al.; Your Honor's February 2, 2006 order in Hershey-Wilson v. City of N.Y., et al., affirmed May 1, 2006; Your Honor's May 16, 2006 memorandum order in Jarick v. City of N.Y., et al. and Your Honor's October 23, 2006 order in Concepcion v. City of New York, 05-CV-8501<sup>2</sup>. Accordingly, Plaintiffs should be compelled to execute authorizations for the release of their psychological records because Plaintiffs' have alleged they suffered emotional injuries as a result of their arrests and detentions and seek compensation for those injuries.

Plaintiffs' argument in their October 23, 2006 letter that Kerman v. City of New York, 374 F.3d 93 (2d Cir. 2004) stands for the principle that there is an emotional injury component to all false arrest claims based on a loss of liberty claim actually *strengthens* defendants' position that discovery of plaintiffs' psychiatric histories is relevant and critical in preparing their defense of this action. That is, discovery of plaintiff's psychological history is also relevant to the separate allegation of loss of liberty. This principle has also been recognized by Magistrate Go of the Eastern District of New York in Anderson v. City of New York, 05-CV-4422 (ERK) (MDG) (April 28, 2006) (a copy of Magistrate Go's Memorandum Order is attached as Ex. 1).

<sup>2</sup> Judge Karas held that "to the extent you are going to ask a jury to award damages from the anxiety as a form of psychological trauma [resulting from an arrest and detention], potentially a very serious form of psychological trauma... that puts into play any sort of psychological history that would explain what it is that might cause [a plaintiff's] anxiety." See Transcript of Aug. 29, 2005 Judge Karas' discovery rulings in Macnamara, et al. v. City of N.Y., et al. Judge Karas added that "when you talk about general psychological damages, the history becomes relevant, and [the psychotherapist-patient privilege] is waived." See id. Judge Karas' and Your Honor's rulings are supported by a long line of authority in this district and the Second Circuit. See Jaffa v. Redmond, 518 U.S. 1, 15 n. 14 (1996) ("like other testimonial privileges, the patient may of course waive the protection [of the psychotherapist-patient privilege]"); n. 19 ("there are situations in which the [psychotherapist-patient] privilege must give way"); Oliphant v. Dept. of Trans., 05-CV-0618, 2006 WL 522126 \*2 (2d Cir. Mar. 3, 2006) (recognizing waiver of psychotherapist-patient privilege where plaintiff alleges emotional distress); Karl v. Asarco Inc., 98-CV-7535, 1998 U.S. App. LEXIS 32696, \*4 (2d Cir. Dec. 31, 1998) (affirming district court's order permitting discovery into (psychological) history because plaintiff waived his privilege by putting mental state into issue); Montgomery v. N.Y.S. Office of Mental Health, 00-CV-4189, 2002 U.S. Dist. LEXIS 5607, \*1-4 (S.D.N.Y. Apr. 3, 2002) (claim for emotional distress waives psychotherapist-patient privilege); Murray v. Bd. of Edu., 199 F.R.D. 154-155 (S.D.N.Y. 2001) (emotional distress claim waived psychotherapist-patient privilege); McKenna v. Cruz, 98-CV-1853, 1998 U.S. Dist. LEXIS 18293, \*6 (S.D.N.Y. Nov. 19, 1998) ("the majority of post-Jaffa cases hold that any claim for emotional or psychological injury waives the psychotherapist-patient privilege"); Sidor v. Reno, 95-CV-9588, 1998 U.S. Dist. LEXIS 4593, \*2-3 (S.D.N.Y. Apr. 7, 1998) (finding waiver of psychotherapist-patient privilege based on *inter alia* plaintiff's seeking damages for emotional pain and suffering); Kerman v. City of N.Y., 96-CV-7865, 1997 U.S. Dist. 16841, \*9, 11 (S.D.N.Y. Oct. 24, 1997) (finding waiver of psychotherapist-patient privilege by allegations of continued emotional damages).

Hon. James C. Francis IV  
 November 13, 2006  
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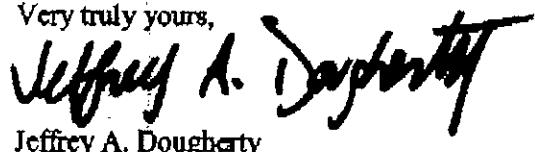
Moreover, the issues before the Second Circuit in Kerman were neither the scope of discovery nor the waiver of the psychotherapist-patient privilege.<sup>3</sup>

Additionally, because Plaintiffs have separately and distinctly pled "emotional distress," "psychological injury," and "great humiliation" in every cause of action in their Amended Complaint and in their interrogatory responses this discovery is clearly necessary and relevant. See selections of Plaintiffs' Amended Complaint attached as Ex. A to defendants' September 12, 2006 Letter Application; see also Plaintiffs' responses to Interrogatory No. 5 attached as Ex. B to defendants' September 12, 2006 Letter Application. Tellingly, Plaintiffs' opposition letter completely fails to address this crucial fact and instead attempts to divert the Court's attention from these unmistakable claims for emotional distress by reference to a logically inconsistent argument based on Kerman. Because Plaintiffs' pleadings and interrogatory responses unequivocally amount to allegations of emotional distress they must be compelled to provide defendants with relevant discovery regarding their psychological history.

The other case Plaintiffs cite in their opposition papers is equally unpersuasive and is not binding authority on this Court. Plaintiffs' reliance on Magistrate Judge Dolinger's decision in Greenberg v. Smolka, 03-CV-8572 (RWS) (MHD) (S.D.N.Y. April 25, 2006) is displaced because that decision is not controlling, is not persuasive, relies heavily on authorities from outside the Southern District, and is contrary to prior authority from this district as well as other New York district courts. Notably, this Court has continually rejected other plaintiffs' reliance on Greenberg. See e.g. Hershey-Wilson and Concepcion.

In conclusion, defendants respectfully request that Plaintiffs be compelled to: (1) fully respond to Interrogatories Nos. 7-9 by identifying all providers that have rendered them counseling, therapy, psychological treatment or psychiatric treatment within the past 10 years; (2) provide defendants with properly executed releases for all providers identified; and (3) provide defendants with properly executed releases for all pharmacies or providers of prescription drugs that Plaintiffs have used in connection with treating any emotional or psychological issues within the past 10 years.

Very truly yours,

  
 Jeffrey A. Dougherty

cc: Michael L. Spiegel, Esq. (by Facsimile)  
 Alan Levine, Esq. (by Facsimile)

<sup>3</sup> Notably, defendants have repeatedly cited the district court's decision in Kerman, which supports defendants' argument here. See Kerman v. City of N.Y., 96-CV-7865, 1997 U.S. Dist. LEXIS 16841, \*9, 11 (S.D.N.Y. Oct. 24, 1997) (finding waiver of psychotherapist-patient privilege by allegations of continued emotional damages).

# Exhibit X

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

(ECF)

-----: 05 Civ. 8453 (KMK) (JCF)  
TARASIK ABDELL, et al., :  
-----

Plaintiffs, : O R D E R  
- against - :  
CITY OF NEW YORK, et al., :  
Defendants. :  
- - - - - :  
C. FRANCIS IV :  
UNITED STATES MAGISTRATE JUDGE :  
USDC SDNY  
DOCUMENT  
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DOC #: 1116106  
DATE FILED: 11/16/06

Defendants having moved to compel plaintiffs David Barrows, Benjamin Bernard, Colleen Cook, Matthew Dietzen, Calla Evans, Adam Feinstein, Barrett Gross, Kathleen Hernandez, Alexander Holley Drummond, Benjamin Hunt, Jennifer Janney, Michael Joseph, Pepper Judd, Sarah Kanouse, Jay Kantor, Andrew Laken, Tessa LaLonde, Jonothan Logan, Ryan McGee, Barbara Ann Meisinger, Tristan Migliore, Mark Nechay, Daniel O'Reilly-Rowe, Katherine Poe, Shannon Petrello, Steven Scofield, Robert J. Siegel, Sarah Tepsic, Ann Trudell, Christy Ann Turner, and Zachary Vreeland to (1) identify all providers who have provided them with psychological or psychiatric counseling or treatment, (2) provide releases with respect to records maintained by these providers, and (3) provide releases for all pharmacies that have filled prescriptions for drugs used by the plaintiffs in connection with any psychological or emotional conditions, it is hereby ORDERED as follows:

1. Plaintiffs shall provide the requested information by November 30, 2006. This issue has been fully litigated and decided in the following related cases: MacNamara, 04 Civ. 9126 (Ruling

dated Aug. 29, 2005); Hershey-Wilson, 05 Civ. 7026 (Order dated Feb. 2, 2006); Jarick, 05 Civ. 7626 (Order dated May 16, 2006); and Concepcion, 05 Civ. 8501 (Order dated Oct. 23, 2006).

2. Plaintiffs Benjamin Bernard, Michael Joseph, Robert J. Siegel, and Christy Turner have represented that they will not disclose such information. Accordingly, their claims for mental and emotional injury are dismissed with prejudice.

SO ORDERED.

James C. Francis IV  
JAMES C. FRANCIS IV  
UNITED STATES MAGISTRATE JUDGE

Dated: New York, New York  
November 16, 2006

Copies mailed this date:

Alan Levine, Esq.  
99 Hudson Street, 14th Floor  
New York, New York 10013

Jeffrey A. Dougherty, Esq.  
Assistant Corporation Counsel  
100 Church Street  
New York, New York 10007

# Exhibit Y

58tkmacc

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK  
-----x

3 DEIRDRE MACNAMARA, et al.,

4 Plaintiffs,

5 v. 04 Civ. 9216

6 CITY OF NEW YORK, et al.,

7 Defendants.

8 -----x

9 New York, N.Y.  
10 August 29, 2005  
11 10:00 a.m.

12 Before:

13 HON. KENNETH M. KARAS,

14 District Judge

15 APPEARANCES

16 MOORE & GOODMAN (by telephone)

17 Attorneys for plaintiff

18 BY: DAVID MILTON

19 MICHAEL CARDOZO

20 Corporation Counsel for the City of New York

21 BY: JAMES MIRRO (by telephone)

22 FRED WHILER

23 Assistant Corporation Counsel

24

25

58tkmacc

1 directed to turn it over, so be it. We have no objection.

2 THE COURT: Look, it is certainly not the epicenter of  
3 the case, I will give you that. But the burden that Mr. Mirro  
4 must meet is fairly low, as you know. I think it is  
5 discoverable under Rule 26 so I think it should be turned over.

6 With respect to the question of medical records and  
7 medical history, both physical and psychological, it seems to  
8 me that -- and even in the cases I read before I got  
9 Mr. Mirro's August 26 letter -- to the extent that your  
10 allegations, Mr. Milton, are very general and your claims of  
11 injury are very general, why isn't it commensurate with that  
12 that there is a greater need on behalf of defendants to find  
13 out the medical history, both psychological and physical, of  
14 your client? If you had claimed, for example, that he broke  
15 his leg, whether or not he had a toothache 10 years ago it  
16 seems to be would be irrelevant. Failing that, it seems  
17 because it is a very general and broad statement -- and the  
18 Northern District case that you described by Judge Pauley as  
19 being the minority view, where the garden variety type of claim  
20 really does not allow a plaintiff in that situation to restrict  
21 access to medical history information. Do you have any greater  
22 sense of what it is your client actually suffered from so maybe  
23 there is a way to narrow this?

24 MR. MILTON: Yes, there is, your Honor. In response  
25 to the interrogatories of all 24 plaintiffs, one of the

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1       questions was please describe in detail all categories of  
2       damages and all physical, emotional and psychological injuries,  
3       and we in response to those detail specifically what injuries  
4       emotional and physical our clients are alleging. So there is a  
5       more specific basis than the complaint.

6               In response to that, for example, no one is claiming,  
7       say, dental injuries, and we didn't turn over dental records,  
8       or gynecological, totally unrelated medical records.

9               Concerning the psychological records, I note again just looking  
10      at this this morning, the cases cited for this principle of  
11      putting medical and psychological issues in question, both were  
12      pre-Jaffe v. Redmond, a Supreme Court case from 1996  
13      recognizing the psychotherapist-patient privilege. In that  
14      they also, I think, addressed the issue of putting things in  
15      issue and said there is not to be a balancing test and that the  
16      interest in recognizing the privilege would not be served if  
17      subsequently there would be a judicial determination, well,  
18      this is relevant, this isn't relevant.

19               MR. MIRRO: Can I address that, your Honor?

20               THE COURT: I have a couple questions for Mr. Milton  
21      first. I am looking at response interrogatory No. 4, and this  
22      is plaintiff William Steyert, Jr., responses, response No. 4,  
23      and you said they were all the same. The interrogatory states  
24      identify all injuries claimed by plaintiff as a result of the  
25      incident and the medical, psychiatric, psychological and other

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1 treatment provided, if any. Response, worry and anxiety as a  
2 result of my false and unjust arrest. The conditions at Pier  
3 57 caused anxiety for mental condition and health.

4 So dental situations, you are right, become  
5 irrelevant, arthroscopic surgery is irrelevant, you name it.  
6 But psychological, this is still fairly generic and I am  
7 wondering why psychological history wouldn't be relevant to  
8 this claim.

9 MR. MILTON: Right, and I think it is precisely  
10 because it is generic that the records aren't relevant. If we  
11 claim, for example, and I believe that with one of our  
12 plaintiffs -- if we claim, for example, that someone is now  
13 suffering from claustrophobia, and a more diagnosable specific  
14 medical injury as opposed to what we are calling garden-variety  
15 distress, to the extent someone has a more specific injury,  
16 yes, it is relevant, but anxiety, worry, to me how we intend  
17 that, it is upsetting to be arrested for what we claim is  
18 obviously without justification, and then to be held for two  
19 days for, essentially, like, a ticket, in the conditions as we  
20 allege them. It sort of adds insult to injury to then have to  
21 disclose your entire family history and whatever else might be  
22 the subject of your therapy when this is a sort of stand-alone  
23 upsetting incident, and we are not claiming anything more and  
24 we will stipulate that we are not claiming for those plaintiffs  
25 anything more than what these cases call garden variety

58tkmacc

1 emotional distress.

2 THE COURT: I do have to say, I think you have to be  
3 careful how you phrase what I am saying. I don't doubt for a  
4 minute that being arrested at all is a very anxious moment and  
5 can cause a tremendous amount of anxiety and distress, let  
6 alone the ticket and being detained for two days. I am not  
7 trying to diminish what it is that your client is claiming. My  
8 point is, to the extent that you are going to ask a jury to  
9 award damages from the anxiety as a form of psychological  
10 trauma, potentially a very serious form of psychological  
11 trauma, it seems to me that puts into play any sort of  
12 psychological history that would explain what it is that might  
13 cause anxiety in your client and what kind of damages he or she  
14 is entitled to as a result of the anxiety that presumably you  
15 would have shown unfairly resulted from what you would say is  
16 an unlawful arrest.

17 So I just think that the cases that I have read, and  
18 it is not a question of balancing, it is a question of whether  
19 the privilege has been waived, that when you talk about general  
20 psychological damages, the history becomes relevant, and it  
21 seems that the cases say it is waived.

22 Mr. Mirro.

23 MR. MIRRO: Thank you, your Honor. I think we are on  
24 the same page. I think I would have said the same things that  
25 you just said, your Honor, which I am happy about. Let me just

# Exhibit Z

Case 1:05-cv-04422-ERK-MDG Document 17 Filed 04/28/2006 Page 1 of 3

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

LISA ANDERSON,

**Plaintiff,**

- against -

## ORDER

CITY OF NEW YORK, et al.,

CV 2005-4422 (BRK) (MDG)

**Defendants**

By letter dated April 12, 2006 (ct doc. 13), defendants move to compel releases for plaintiff's medical records. As discussed on the record at a hearing on April 27, 2006, this Court finds that plaintiff has placed her mental condition at issue in this litigation and consequently has waived her right to prevent the disclosure of her mental health records. See Manessis v. New York City Dep't of Transp., No. 02 CIV. 359, 2002 WL 31115032, at \*2 (S.D.N.Y. Sept. 24, 2002). Although plaintiff has withdrawn her claim for emotional damages, plaintiff can nonetheless provide evidence of her emotional distress through her testimony regarding her claims for damages for loss of liberty and for humiliation resulting from a strip search. Thus, she has opened the door to discovery regarding her mental and emotional state. See Cuoco v. U.S. Bureau of Prisons, 98 Civ. 9009, 2003 WL 1618530, at \*3 (S.D.N.Y. March 27, 2003) (permitting discovery to ascertain whether plaintiff's distress was caused by other

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circumstances because plaintiff can testify about her emotional injuries without a psychotherapist); Montgomery v. New York State Office of Mental Health, No. 00 Civ. 4189, 2002 WL 500357, at \*2 (S.D.N.Y. April 3, 2002) (noting that even if plaintiff did not seek damages for emotional distress, "it would be impossible to remove the issue of plaintiff's mental state from the jury's consideration").

Further, although the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. §§ 1320 *et seq.*, and the regulations promulgated thereunder require health care providers to protect the confidentiality of patient records, the regulations expressly provide that "[a] covered entity may disclose protected health information in the course of any judicial or administrative proceeding: (i) [i]n response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order...." 45 C.F.R. § 164.512(e)(1). Thus, this Court may order disclosure of such records. See National Abortion Federation v. Ashcroft, No. 03 Civ. 87695 (RCC), 2004 WL 555701, at \*2-\*3 (S.D.N.Y. March 19, 2004) (discussing statutory and regulatory framework); Bayne v. Provost, 359 F. Supp. 2d 234, 237 (N.D.N.Y. 2005) (discussing 45 C.F.R. § 164.512).

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CONCLUSION

Defendants' motion to compel the production of plaintiff's psychiatric, psychological, counseling and mental health records, in addition to social security disability and Medicaid/Medicare records, is granted. Plaintiff, all mental health care providers, and holders of the aforesaid records for the period from January 1, 2000 to the present must promptly provide to defendant all records concerning plaintiff for that time period.

SO ORDERED.

Dated: Brooklyn, New York  
April 28, 2006

/s/  
MARILYN D. GO  
UNITED STATES MAGISTRATE JUDGE

# Exhibit AA

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- X  
JULIA R. COHEN

Plaintiff,

-versus-

05 CV 6780 (KMK)(JCF)

THE CITY OF NEW YORK, et al.

Defendants.

----- X

**ORDER OF DISMISSAL**

It is hereby ordered that:

- (1) Plaintiff's claims against all defendants for mental anguish and emotional distress allegedly suffered by her as a result of the incidents about which she complains in this action, including any claim for any intentional or negligent infliction of emotional distress and any claim for damages based upon mental anguish or emotional distress (however articulated) are dismissed with prejudice;
- (2) Plaintiff shall not offer any testimony or other evidence through any witness, at trial or otherwise, concerning her alleged mental anguish or emotional distress (however articulated); and her counsel shall not solicit such testimony from any witness, or offer such testimony or other evidence, at trial or otherwise, concerning the foregoing issues;
- (3) Plaintiff's counsel shall be precluded from making any reference at trial to plaintiff's alleged mental anguish or emotional distress (however articulated) during any argument to the jury, to the Court or otherwise; and
- (4) The jury shall be instructed that Plaintiff is not entitled to any damages for emotional distress.

**SO ORDERED**

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Kenneth M. Karas  
United States District Judge

Dated: